2009

Smith's Food and Drug, Inc. v. Utah Labor Commission : Reply Brief

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

SMITH'S FOOD AND DRUG, INC.,	:	Court of Appeals
	:	Case No.: 20090292
Petitioner/Appellant,	:	Priority 7
vs.	:	
LABOR COMMISSION OF UTAH and GINA CHRISTENSEN,	:	
	:	Labor Commission Nos.:
Respondents.	:	02-0436; 02-0948; 02-0949
	:	

REPLY BRIEF OF APPELLANT

Appeal from the Utah Labor Commission

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APPELLANTS RESPECTFULLY REQUEST ORAL ARGUMENT AND THAT THIS CASE BE REPORTED.

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POINT 1: MS. CHRISTENSEN CITES TO AN INCORRECT STANDARD OF REVIEW.

The standard of review cited by Ms. Christensen is incorrect for the issue presented in this case. Ms. Christensen cites a "reasonableness" standard of review which is not correct. The standard of review for the sole issue presented in this appeal is a correction of error standard. In Esquivel v. Labor Comm'n, 2000 UT 47, 982 P.2d 87, the Court articulated the proper standard of review for administrative proceedings. It stated:

> matters of statutory construction are questions of law, reviewed for correctness. . . . An exception to this general rule exists if the legislature has either explicitly or implicitly granted discretion to the agency. However, absent a grant of discretion, an agency's interpretation or application of a statutory term should be reviewed under the correction of error standard.

Id. at ¶¶13-14; see also LPI Services v. Labor Commission, 2007 UT. App. 375, 173 P.3d 858.

Utah's appellate courts have routinely held that whether the trial court selected the applicable law is a question of law, reviewed for correctness. See 4447 Assoc. v. First Sec. Fin., 973 P.2d 992, 995 (Utah Ct. App. 1999); Wilde v. Wilde, 969 P.2d 438, 442 (Utah Ct. App. 1998);

Shaw v. Layton Constr. Co., 872 P.2d 1059, 1061 (Utah Ct. App. 1994) (whether court applied the correct law is a question of law, reviewed for correctness). Such is the case here.

This appeal stems from the Commission's error in concluding that Ms. Christensen's activities while working for Smiths Food and Drug over several months should be classified as an industrial accident rather than as an occupational disease under Utah Code Ann. §34A-2-401 versus Utah Code Ann. §34A-3-103 et seq. In other words, the issue presented involves whether the Commission selected and applied the correct law in this case — ie., Utah Worker's Compensation Act versus the Utah Occupational Disease Act. Given that the issue involved is one of general law, no deference need be given to the Commission and no marshaling of facts need be had. [1]

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[1] Since Appellants do not challenge the underlying facts, there is no need to "marshall the evidence" as argued by Ms. Christensen in her Brief.

POINT 2: SINCE MS. CHRISTENSEN DID NOT CORRECTLY FILE HER CASE AS AN OCCUPATIONAL DISEASE, SHE IS NOT ALLOWED ANY RECOVERY UNDER UTAH LAW.

Ms. Christensen asserts that this Appellate Court and the Labor Commission, cannot *sua sponte* change an injured worker's theory of relief in a case. See Hilton Hotel v. Industrial Commission, 897 P.2d 352 (Utah Ct. App. 1995). This statement of law is correct. See id.; Acosta v. Labor Commission, 2002 UT App 67, 44 P.3d 819.

Indeed, the Court held in Hilton Hotel that the Commission erred in entering an order outside the issues and theories presented in a case when a theory was never addressed as part of an injured worker's case. See id. The court held similarly in Acosta when an Administrative Law Judge adjudicated a cumulative trauma theory of relief when it was not raised in pleadings by the worker. However, what Ms. Christensen fails to recognize is that, as the moving party, she still carries the burden of filing an Application for Hearing under the correct theory of relief. In this case, the correct basis of relief for any *possible* recovery is the Utah Occupational Disease Act.[2] Since the material facts of the claim qualify as an occupational disease claim rather than as an industrial accident

[2] Although she originally filed her claim to include an occupational theory of relief for the period of 1994 to 2002, she subsequently withdrew that claim at the evidentiary hearing. (R., 35; R. 172).

claim, Ms. Christensen was required to file her claim as an occupational disease rather than as industrial accident. Since she failed to properly do so, this Court should recognize that her claims should have been filed as an occupational disease and dismiss her claim. Smith's further agrees that under Utah law, the Court should not and cannot under Utah law now, "convert" her claim *sua sponte* into an occupational disease claim given her improper filing and unilateral decision to withdraw her original occupational disease claim.

POINT 3: MS. CHRISTENSEN'S CLAIM IS NOT AN INDUSTRIAL "ACCIDENT" AND SHOULD NOT BE ADJUDICATED UNDER THE UTAH WORKER'S COMPENSATION ACT

Ms. Christensen also argues that the definition of "accident" under Utah Code Ann. §34A-2-401 is not limited to single exertion injuries. On this basis, she argues that her claim could be filed and adjudicated as an industrial accident under the Utah Worker's Compensation Act on the basis of a "repetitive" or "cumulative trauma" accident claim.

Ms. Christensen is correct that Utah law does permit relief in certain cases under the Worker's Compensation Act for accidents that occur as a result of "cumulative trauma". See Nyrhen v. Industrial Comm'n, 800 P.2d 330 (Utah Ct. App. 1990). However, the facts of this

case are far different than those cited by Ms. Christensen which are very narrow in holding.

First, the present case involves repetitive activities that spanned over a period of at least *five months,* much longer than the repetitive time period identified in Nyrhen. For instance, in Nyhren the Court held that a 2½ month period of cumulatively lifting tubs of merchandise qualified as an "accident" under the Utah Worker's Compensation Act. The period of exposure in this case is much longer. See also Dale T. Smith & Sons v. Utah Labor Comm'n, 2009 UT 19, 208 P.3d 533 (occupational disease act applies to low back condition occurring during course of twenty year period).

Second, unlike the cases cited by Ms. Christensen, her neck condition is better classified as gradually developing over time with *no exact starting* point, indicative of an occupational disease. See Thompson v. Industrial Commission, 23 P.2d 930 (Utah 1933). Indeed, the Utah Supreme Court has held that if an injury is incurred gradually in the course of the employment, and there is no specific event or occurrence known as the starting point, it is held to be an occupational disease, and not an injury resulting from accident. See id. In Schmidt v. Industrial

Commission, 617 P.2d 693 (Utah 1980), the court held that an accident must have a definite time and place. See id. Such is the case here.

Ms. Christensen's testimony at hearing was that her work activities of lifting and carrying large vats of cheese occurred while working as a cheese cook for Smith's in July or August, 2001 through November 20, 2001, ultimately causing her neck condition. She was unable to specify the starting point of her neck pain in time and place. Under Utah case law, it is evident that an accident, even when occurring over time due to cumulative activities, must *still* be "definitely located as to time and place." See Thompson, 23 P.2d at 933. Ms. Christensen cannot identify an exact starting point as to time or place of her neck problems at work. In fact, she testified at hearing that she first felt neck pain when driving her car and not while at work performing her job duties from Smith's. (R., 191, Tr. 83-84). Given this, Ms. Christensen's claim must be classified as an occupational disease rather than as an industrial accident.

POINT 4: THE COMMISSION'S RULING LENDS TOWARDS UNCERTAINTY AND CONFUSION IN FUTURE LITIGATION

The import of this decision has a profound effect on public policy and the filing of future claims at the Utah Labor Commission. It is evident that Ms. Christensen could have filed an Application for Hearing under the Utah Occupational Disease Act, Utah Code Ann. § 34A-3-101 et seq. She likely chose not to do so because the Occupational Disease Act ("ODA") allows for apportionment of medical and indemnity compensation under Utah Code Ann. §34A-3-110 for non-industrial conditions. The Utah Worker's Compensation Act does not have a similar provision. In other words, by filing under the ODA, she would likely get less worker's compensation benefits since the ALJ is required to apportion between industrial and non-industrial conditions. To allow an applicant different avenues of recovery under the Utah worker's compensation system causes confusion and provides lack of judicial uniformity in decisions. Utah's courts have held that the worker's compensation statute must be interpreted not only from the judicial, but also from a social point of view, so as to give material justice it is due, while formal jurisprudence has to stand back. See Ogden Iron Works v.

Industrial Comm'n, 102 Utah 492, 132 P.2d 376 (1942). We ask that the court do so here.

In Masich, the Court examined the history and purpose of the Occupational Disease Act and the Worker's Compensation Act. The court held:

> If we hurriedly scan the history and development of the law of compensation in this country, we first find the legislatures and courts dealing with accidental injuries arising out of or in the course of employment. These acts covered [*107] the employee who was accidentally injured in the [***7] course of his employment, but failed to cover an employee who was rendered ill because of an occupational disease. Some jurisdictions extended the coverage of the act to include occupational diseases, but for the most part the employee suffering from an occupational disease was left to his common law right of action.
>
> In this state the Workmen's Compensation Act, Utah Code 1943, 42-1-1 et seq., was construed to involve only accidental injuries, so that when an employee suffered an occupational disease, he was confronted with the necessity of establishing actual negligence on the part of the employer and was confronted by the common law defenses then available to the employer. This court recognized that the legislature had not occupied the field of occupational diseases when the Workmen's Compensation Act was passed; and so the employee suffering from disease was limited to his common law right of action. See Young v. Salt Lake City, 97 Utah 123, 90 P. 2d 174 (1939). . . .
>
> Shortly after this court decided the Young v. Salt Lake City case, *supra*, the legislature enacted the Occupational Disease Statute. Much of the wording of this act was taken from the Workmen's Compensation Act, ...

In newly enacted legislation it is sometimes necessary in order to determine the legislative intent, to scrutinize an act to the extent of dealing with [***9] or transposing a phrase, a single word, or even a punctuation mark; but no such refined scrutiny is necessary in this case. This for the reason that for many years our legislature has been dealing with a companion act similar in phraseology and context; the Workmen's Compensation Act has been passed on repeatedly by this court, and the legislature has been content to accept the construction placed on that act by this court. HN7 The intent, purposes and objectives of the Occupational Disease Act, which is closely allied to the Workmen's Compensation Act, can be determined by reliance on former interpretations of the Workmen's Compensation Act without searching through the refinements [**616] of construction necessary, had the former act not been before the legislature on many occasions. In addition, the legislative intent in the Occupational Disease Statutes does not depend on the correlation or arrangement of words alone. Other and different reasons can be considered. One of the cardinal principles of statutory construction is that the courts will look to the reason, spirit, and sense of the legislation, as indicated by the entire context and subject matter of the statute dealing [***10] with the subject.

. . .

With this principle to guide us, we analyze the effect of the two interpretations of the Disease Act, as suggested by counsel for the respective parties. . . .

[*116] If we were to adopt the first construction contended for, we would not only upset what has been long regarded as the law of this state in the accidental injury field, **we would further render the Occupational Disease Act so confusing, uncertain and impractical that proper administration would be almost impossible**. . . .. **Without detailing all of the difficulties to be encountered were such an interpretation rendered, enough have been mentioned to indicate that one of the beneficent purposes of such [***26] acts, to avoid litigation, lessen expense thereof, and afford an efficient and speedy tribunal to determine**

and award compensation, would be thwarted.

HN10 **The duty of a court to avoid a construction that will result in confusion or uncertainty is a duty recognized by all. The general rule in this regard is stated as follows**, in 50 Am. Jur., Statutes, Par. 382:

> In the interpretation of statutes, a court should be astute in avoiding a construction which may be productive of much litigation and insecurity, or which would throw the meaning or administration of [*117] the law, or the forms of business, into hopeless confusion or uncertainty. Indeed, it has been declared that statutes should never be given a construction that leads to uncertainty or confusion, if it is possible to construe them otherwise. **Hence, an interpretation should, if possible, be put upon the provisions of a law which will permit the officials having the responsibility for its administration to proceed in an orderly manner. A particular construction will also be favored where it appears to be the only one which will afford a fixed, permanent, and certain rule to ascertain whether a particular case is included [***27] within or excluded from the operation of the statute**. Similarly, where the construction of a statute involves a choice between uncertainties, the lesser should be chosen. . . .

Masich v. United States Smelting, Ref. & Mining Co., 113 Utah 101, 106-117 (Utah 1948).

In this case, the Commission's interpretation of the Worker's Compensation Act lends to confusion and uncertainty for future litigation of cases where the worker's medical problem slowly progresses over time,

and is contributed to by both non-industrial and industrial factors or conditions. Under the Commission's interpretation of the term "accident", Ms. Christensen's work events qualify under both the definitions of "accident" and "occupational disease" and could be filed under either the Occupational Disease Act or Worker's Compensation Act. It is evident from the history of Utah law noted above, and other cases,[3] that the legislature did not intend that the terms "accident" and "occupational disease" be interpreted and applied interchangeably. This Court should fashion an interpretation of the term "accident" to permit officials having the responsibility for its administration to proceed in an orderly manner. Or in the alternative, provide clear interpretation that a slowly progressing medical condition must be classified as an occupational disease and not as an industrial accident. See id., 117. We submit that this court should enunciate a clear standard in which to define an accident versus that of an occupational disease and clarify the proper standard for each.

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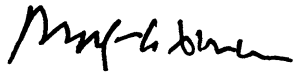
[3] Carling v. Industrial Comm'n, 16 Utah 2d 260 (Utah 1965); Kaiser Steel Corp. v. Monfredi, 631 P.2d 888 (Utah 1981); Thompson v. Industrial Commission, 23 P.2d 930 (Utah 1933).

CONCLUSION

Based upon the arguments set forth herein, Smith's requests that the Court of Appeals reverse the Commission's Order Affirming ALJ's Decision dated March 16, 2009, and hold that the Occupational Disease Act applies to Ms. Christensen's claim for workers' compensation benefits rather that the Utah Worker's Compensation Act.

Respectfully submitted this 18th day of May, 2010.

BLACKBURN & STOLL, LC



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